Supreme Court, U.S.
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No. 92-833

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**KEVIN ALBRIGHT,**

*Petitioner,*

v.

**ROGER OLIVER, individually and in his official capacity as police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,**

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES ..... | iii |
| RELEVANT STATUTES ..... | 1 |
| REASONS WHY CERTIORARI SHOULD BE DENIED ..... | 2 |
| I. | |
| THE INITIATION OF CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN THE PRESENCE OF PROBABLE CAUSE DOES NOT GIVE RISE TO A FEDERAL DUE PROCESS CLAIM PURSUANT TO 42 U.S.C. § 1983 ..... | 2 |
| A. The Constitution does not Contain a Requirement of Probable Cause to Prosecute ..... | 2 |
| B. The Constitution does not Require the Initiation of Criminal Charges to be Supported by an Objectively Reasonable Belief in the Presence of Probable Cause .. | 5 |
| C. The Conditions of Petitioner's Bond did not Constitute a "Significant Restraint of Liberty" Within the Meaning of *Gerstein v. Pugh* ..... | 7 |
| II. | |
| ASSUMING PETITIONER HAS ADEQUATELY PLED A CONSTITUTIONAL CLAIM, SUCH CLAIM IS TIME-BARRED UNDER THE STATUTE OF LIMITATIONS ..... | 12 |

III.

DEFENDANT OLIVER'S ENTITLEMENT TO QUALIFIED IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT ..... 15

IV.

PETITIONER'S FAILURE TO SUFFICIENTLY ALLEGE THAT HE WAS PROSECUTED PURSUANT TO A MUNICIPAL CUSTOM, PRACTICE OR POLICY PROVIDES AN ALTERNATIVE BASIS FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THE CITY OF MACOMB ..... 16

CONCLUSION ..... 18



## TABLE OF AUTHORITIES

| *Cases* | PAGE |
|---|---|
| *Anderson v. Creighton*, 483 U.S. 635 (1987) ..... | 5, 6, 15 |
| *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986) . | 12 |
| *Baker v. McCollan*, 443 U.S. 137 (1979) ..... | 10 |
| *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979) ..... | 13 |
| *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied, Campbell (sic) v. Brummett*, 112 S.Ct. 2323 (1992) ..... | 3, 15 |
| *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) ..... | 17 |
| *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) . | 10 |
| *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987) ..... | 8 |
| *Gerstein v. Pugh*, 420 U.S. 103 (1975) .... | 2, 3, 7, 8, 14 |
| *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied, Maxwell v. Goodwin*, 494 U.S. 1081 (1990) ..... | 3 |
| *Gunderson v. Schlueter*, 904 F.2d 407 (8th Cir. 1990) ..... | 4, 8 |
| *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... | 15 |
| *In re: Winship*, 397 U.S. 358 (1970) ..... | 4, 9 |
| *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) ..... | 16 |
| *Kentucky v. Graham*, 473 U.S. 159 (1985) ..... | 16 |
| *King v. Goldsmith*, 897 F.2d 885 (1990) ..... | 14 |
| *Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986) .. | 16 |

*Lee v. Mihalich*, 847 F.2d 66 (3d Cir. 1988) ... 3
*Malley v. Briggs*, 475 U.S. 335 (1986) ..... 5, 6
*Mapp v. Ohio*, 367 U.S. 643 (1961) ..... 4
*Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658 (1978) ..... 16, 17
*Paul v. Davis*, 424 U.S. 693 (1976) ..... 7, 10, 11
*Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) ..... 17
*Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990) ..... 13
*Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989) ..... 13
*Siegert v. Gilley*, 111 S.Ct. 1789 (1991) ..... 11
*Singleton v. City of New York*, 632 F.2d 185 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) .. 13
*Smith v. Massachusetts Dept. of Correction*, 936 F.2d 1390 (1st Cir. 1991) ..... 8
*Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988) ... 14
*Soldal v. Cook County, Ill.*, 113 S.Ct. 538 (1992) . 5
*Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988) . 3
*Stukes v. Shovlin*, 464 F.2d 1211 (3rd Cir. 1972) . 9, 10
*United States v. Dionisio*, 410 U.S. 1 (1973) ..... 10
*United States v. Leon*, 468 U.S. 897 (1984) .... 5, 6
*United States v. MacDonald*, 456 U.S. 1 (1982) .. 8
*United States v. Mara*, 410 U.S. 19 (1973) ..... 10
*United States v. Simmons*, 536 F.2d 827 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976) ..... 9
*Wayte v. United States*, 470 U.S. 598 (1985) ... 4



*Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254 (5th Cir. 1984) ..... 3, 4
*Wilson v. Garcia*, 471 U.S. 261 (1985) ..... 12
*Wilson v. Thompson*, 638 F.2d 799 (6th Cir. 1981) . 4
*Winston v. Lee*, 470 U.S. 753 (1985) ..... 2
*Wilson v. Seiter*, 111 S.Ct. 2321 (1991) ..... 3

*Constitutional Provisions and Relevant Statutes*

U.S. Const. Amend. I ..... 4
U.S. Const. Amend. IV ..... *passim*
U.S. Const. Amend. V ..... 4
U.S. Const. Amend. VI ..... 4, 8
U.S. Const. Amend. XIV ..... *passim*
Ill. Rev. Stat. ch. 38, para. 110-10(a)(3) (1991) .... 1, 8, 9

*Miscellaneous Authorities*

*W. LaFave & J. Israel, Criminal Procedure*, Vol. 2, § 18.1, pp. 397-98 (1984) ..... 9
*2 Moore's Federal Practice*, § 2.08(2) n. 25 ..... 12
S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of § 1983*, § 3.15, p. 214 (3rd Ed. 1991) ..... 13
*Restatement 2d Torts*, § 653 ..... 11
M. Schwartz & J. Kirklin, *§ 1983 Litigation: Claims, Defenses and Fees*, § 3.10, p. 169 (2nd Ed. 1991) ..... 17, 18

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## RELEVANT STATUTES

Ill.Rev.Stat. ch. 38, para. 110-10(a)(3) (1991):

(a) If a Person is released prior to conviction, either upon payment of bail security or on his or her own recognizance, the conditions of the bail bond shall be that he or she will:

(3) Not depart this State without leave of the court;

## REASONS WHY CERTIORARI SHOULD BE DENIED

### I.

### THE INITIATION OF CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN THE PRESENCE OF PROBABLE CAUSE DOES NOT GIVE RISE TO A FEDERAL DUE PROCESS CLAIM PURSUANT TO 42 U.S.C. § 1983

The issue, as framed by Petitioner, is whether the initiation of criminal charges without an objectively reasonable belief in the presence of probable cause deprives a criminal defendant of a liberty interest without due process (Petitioner's Petition for a Writ of *Certiorari* (hereinafter Petition), Questions Presented). Petitioner does not contend that the circumstances of his prosecution violated the fourth amendment, but rather, Petitioner merely analogizes to the fourth amendment's requirement of probable cause to support his effort to engraft a probable cause requirement onto the due process clause of the fourteenth amendment (Petition, pp. 18-19).

#### A. The Constitution Does Not Contain a Requirement of Probable Cause to Prosecute

Respondents contend that the presence or absence of probable cause is irrelevant to the constitutional validity of the decision to bring criminal charges. Indeed, the due process clause does not, on its face, refer to probable cause. To the contrary, the phrase "probable cause" is confined to the fourth amendment, and addresses the legality of searches and seizures of a person or her possessions. *See, e.g., Winston v. Lee*, 470 U.S. 753, 759 (1985). Accordingly, this Honorable Court has acknowledged that "the probable cause determination is not a constitutional prerequisite to the charging decision." *Gerstein v. Pugh*, 420



U.S. 103, 125 n. 26 (1975). It would seem, therefore, that the lack of textual support for a requirement of probable cause to prosecute, in conjunction with this Court's statement in *Gerstein*, should close the door on Petitioner's efforts to federalize the common law tort of malicious prosecution. *Cf. Wilson v. Seiter*, 111 S.Ct. 2321, 2326 (1991) ("an intent requirement is either implicit in the word punishment or is not, it cannot be alternately required under the eighth amendment and ignored as policy considerations might dictate").

Nevertheless, certain courts have inferred a requirement of probable cause to prosecute from the due process clause in an effort to avoid what they have perceived to be a draconian alternative.[1] This trend began with *Wheeler v. Cosden Oil and Chemical Co.*, where the Fifth Circuit concluded, essentially on the basis of public policy, that a prosecutor carries a constitutionally imposed "duty to determine probable cause before charging." 734 F.2d 254, 259-60 (5th Cir. 1984). *But see Brummett v. Camble*, 946 F.2d 1178, 1180-81 n. 2 (5th Cir. 1991) (questioning continued vitality of *Wheeler*), *cert. denied*, 112 S.Ct. 2323 (1992). Conceding that its holding was tenuous in light of *Gerstein*, the *Wheeler* court nonetheless concluded that without a probable cause requirement, "the state prosecutor need have no basis whatever for criminal charges—even trivial ones—but may without constitutional disapproval subject whomever he wishes to whimsical prosecution." *Wheeler*, 734 F.2d at 259.

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[1] *See, e.g., Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988); *Strength v. Hubert*, 854 F.2d 421, 525-26 (11th Cir. 1988); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989), *cert. denied*, *Maxwell v. Goodwin*, 494 U.S. 1081 (1990).

This public policy concern expressed by *Wheeler* and its progeny is unsound. In the context of criminal prosecutions, the sixth amendment provides the bulwark of constitutional protections to criminal defendants. Indeed, the sixth amendment guarantees of right to counsel and a fair jury trial provide the most specific and important constitutional protections against arbitrary and whimsical prosecutions. *See* U.S. Const. Amend. VI. *Accord Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) ("Constitution mandates procedures designed to protect defendants").

Moreover, several other constitutional guarantees have been interpreted to provide protections against unfounded prosecutions. For instance, the equal protection clause prohibits discriminatory or selective prosecutions. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The fifth amendment prohibits a criminal defendant from being tried twice and entitles him to remain silent at trial. U.S. Const. Amend. V. The first amendment guarantees that citizens will not be subjected to criminal prosecutions in retaliation for protected speech. *Wilson v. Thompson*, 638 F.2d 799 (6th Cir. 1981). The fourth amendment operates to cause the suppression of illegally obtained evidence and confessions at trial. *Mapp v. Ohio*, 367 U.S. 643 (1961). In addition, as pointed out by Petitioner (Petition, p. 15), the due process clause has been interpreted to require proof of guilt beyond a reasonable doubt in order to sustain a criminal conviction. *In re: Winship*, 397 U.S. 358 (1970).

When considered together, this wide array of constitutional protections soundly defeats the *Wheeler* court's concern that a requirement of probable cause is necessary to guard against unfounded prosecutions. While a probable cause requirement would perhaps provide an added layer of constitutional protection, it certainly would not stand alone as the only buffer between a citizen and his ex-



posure to unfounded criminal charges. In the search and seizure context, by contrast, the substantive requirement of probable cause in conjunction with the procedural protections provided by the warrant requirement serve as essentially the sole constitutional checks on the government's otherwise unfettered power to arbitrarily invade privacy interests. *See, e.g., Soldal v. Cook County, Ill.*, 113 S.Ct. 538 (1992). Accordingly, even if considerations of public policy were the proper method for analyzing the source and scope of constitutional protections, such considerations would not compel a probable cause requirement in connection with the bringing of criminal charges.

### B. The Constitution Does Not Require the Initiation of Criminal Charges to be Supported by an Objectively Reasonable Belief in the Presence of Probable Cause

Having dispensed with the suggestion that every prosecution without probable cause raises constitutional concerns, Respondents now turn to the heart of Petitioner's contention: that probable cause is a constitutional prerequisite to the filing of criminal charges when an officer's mistaken belief in its presence is "objectively unreasonable." (Petition, pp. 20-21) To support that theory, Petitioner relies essentially on official immunity cases such as *Malley v. Briggs*, 475 U.S. 335 (1986), and *Anderson v. Creighton*, 483 U.S. 635 (1987), which impose liability for false arrest under § 1983 only for an objectively unreasonable failure to recognize the absence of probable cause. Petitioner also relies on *United States v. Leon*, 468 U.S. 897 (1984) which permits application of the exclusionary rule in criminal cases only where an illegal seizure of evidence was objectively reasonable.

Petitioner's novel and rather creative argument misguidedly collapses the fourth amendment into the due

process clause and confuses immunity considerations with constitutional analysis. Probable cause is either a requirement of due process or it is not; the absence of probable cause is not any more or less unconstitutional because the officer reasonably or unreasonably perceived it to be present. While objective reasonableness as described in cases such as *Malley* and *Anderson* would be instructive in assessing Respondents' entitlement to qualified immunity in the event probable cause were held to be a constitutional precondition to the filing of charges, that concept and those cases are irrelevant in terms of answering the threshold question as to the inter-relationship between probable cause and the due process clause.[2] Indeed, qualified immunity is simply a judicially created remedy which benefits the public by limiting the liabilities faced by public officials who mistakenly, but reasonably engage in constitutionally infirm conduct. This immunity has no genesis in the Constitution and it is irrelevant to constitutional analysis.

Similarly, *Leon* simply limits the application of another judicially created remedy (the exclusionary rule) in situations where law enforcement officials mistakenly, yet reasonably seize evidence in violation of the fourth amendment. *See Leon*, 468 U.S. at 906-07. The holding in *Leon* was not constitutionally based, but rather, was premised, like immunity decisions, on considerations of public policy involving a balancing of privacy and law enforcement interests. *Id.* Accordingly, *Leon* provides no support to Petitioner's efforts to engraft a probable cause requirement

[2] *Malley* does not, as Petitioner suggests (Petition, p. 21), speak to the "reckless pursui[t] [of] a baseless prosecution," but rather, *Malley* addressed only the scope of immunity for an officer's efforts to procure an arrest warrant.



(whether based on "objective reasonableness" or not) onto the due process clause.

Given the lack of either textual underpinnings or a policy-based necessity for a requirement of probable cause to prosecute, it seems the only remaining justification lies in the fact that the states have adopted such a requirement through the common law tort of malicious prosecution. This justification, however, is inadequate. First, it is well-established that the mere violation of state law is insufficient to give rise to a constitutional claim. *Paul v. Davis*, 424 U.S. 693, 700 (1976). Second, it is equally well-established that the federal courts are loathe to turn § 1983 into a font of federal tort law. *Id.*

### C. The Conditions of Petitioner's Bond Did Not Constitute A "Significant Restraint of Liberty" Within the Meaning of *Gerstein v. Pugh*

Respondents do not contend that the filing of criminal charges can never trigger a requirement of probable cause. To the contrary, *Gerstein* teaches that probable cause is required "only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). Thus, a criminal defendant's incarceration pending dismissal of criminal charges constitutes a sufficient deprivation of liberty to trigger the fourth amendment's requirement of probable cause. *Id.* at 125.

But what about a prosecution where the defendant is free on bond during the pendency of the charges? Can the conditions of bond themselves cause a deprivation of liberty sufficient to warrant federal review of the propriety of a criminal prosecution? This Honorable Court hinted at the answer in *Gerstein* in stating that probable cause

is only required when the prosecution causes a "significant restraint on liberty." *Gerstein*, 420 U.S. at 125 n. 26.[3]

Petitioner argues that the circumstances of his prosecution and the conditions of his bond do constitute a significant restraint on liberty based, in part, on cases interpreting the speedy trial clause of the sixth amendment. Specifically, Petitioner contends that the speedy trial clause protects liberty, and one aspect of liberty in the context of a criminal prosecution is the "right to be let alone" and to be spared the anxiety, anguish and disruption of life posed by the pendency of criminal charges (Petition, pp. 22-25). In support, Petitioner cites *United States v. MacDonald*, 456 U.S. 1, 8 (1982), where this Court stated that "the speedy trial guarantee is designed [among other things] to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail . . ." (Petition, p. 23).

Notwithstanding this dicta in *MacDonald*, the mere conditions of bail are an insufficient restraint on liberty to trigger a probable cause requirement. While Petitioner has focused on the minimal restraints on liberty imposed by the conditions of bond, he has not addressed the wide latitude of freedom permitted under America's bail system. Most notably, the criminal defendant is free from physical confinement. He may also work, earn a living and remain with his family and friends. He may even leave the state in appropriate cases provided he seeks leave of court before doing so. *See* Ill.Rev.Stat. ch. 38, para.

[3] Several courts of appeal agree that malicious prosecution is not, of itself, constitutionally redressable. *See, e.g., Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987); *Smith v. Massachusetts Dept. of Correction*, 936 F.2d 1390, 1402 (1st Cir. 1991).



110-10(a)(3) (1991). In short, the criminal defendant who is free on bond enjoys a relatively unimpaired existence, albeit often burdened with some harm to reputation, and with anxiety and mental hardship caused by concern over the potential disposition of the charges.

Though Respondents do not minimize Petitioner's legitimate reaction to the placement of criminal charges against him, the Constitution has never been read to provide a remedy for every inconvenience or disruption of life occasioned by the government.[4] And, while Petitioner accurately identifies the "right to be let alone" as an aspect of liberty protected under the speedy trial clause, it is the least important of the three interests protected under the sixth amendment. *See* W. LaFave & J. Israel, *Criminal Procedure*, Vol. 2, § 18.1, pp. 397-98 (1984). Far more compelling are concerns over the length of a suspect's incarceration pending disposition of criminal charges and the fact that the passage of too much time will interfere with the defendant's ability to defend against the charges. *Id.* General claims of anxiety and stress, on the other hand, are inevitable in response to criminal charges and fail to raise sixth amendment concerns absent a more specific and serious showing of actual prejudice. *Id.*, § 18.2, p. 410 (requiring unusual showing of prejudice). *See also United States v. Simmons*, 536 F.2d 827, 831-32 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976); *Stukes v. Shovlin*, 464 F.2d

[4] Petitioner also suggests that his prosecution without a reasonable belief in probable cause placed him at risk of a conviction on less than proof beyond a reasonable doubt (Petition, pp. 19-21). It is true that this evidentiary threshold has been interpreted as constitutionally required. *In re: Winship*, 397 U.S. 358 (1970). Nonetheless, in light of the fact that Petitioner was never convicted, it is implausible to contend that the mere exposure to the risk of a constitutional deprivation can itself constitute an actionable deprivation of liberty.

1211, 1214-15 (3rd Cir. 1972) (requiring showing of "severe anxiety reaction" attendant to prolonged confinement).

Other cases further illustrate the principle that mere interference with a citizen's "right to be let alone" does not of itself support a constitutional claim. For instance, witnesses may be compelled to appear before a grand jury and to provide evidence without even implicating the fourth amendment, despite the substantial anxiety and disruption occasioned by receipt of a grand jury subpoena. *See United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973). In such instances, this Court has emphasized that not every inconvenience and disruption of life attributable to the government implicates the Constitution. *Dionisio*, 410 U.S. at 10.

Similarly, in *Baker v. McCollan*, 443 U.S. 137 (1979), this Court implied that the extent of the intrusion, rather than the mere fact of interference with liberty, was relevant to the presence of a constitutional duty. In that case, a county sheriff was not constitutionally required to investigate the claims of innocence of an arrestee who was detained for a few days pursuant to a valid arrest warrant. This Court noted, however, that at a certain unspecified point in time, the length of the detention could trigger a constitutional duty to investigate a plausible explanation. *Id.* at 144-45. *See also Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985) ("duration of the detention . . . highly relevant to a constitutional examination").

Perhaps most persuasive on this point is this Honorable Court's discussion of liberty in *Paul v. Davis*, 424 U.S. 693 (1976). There, the Court held that damage to reputation (which, of course, causes substantial anxiety, emotional suffering and harm to social and employment opportunities) could not, by itself, support a due process claim



alleging a deprivation of liberty. Reasoning that a contrary holding would result in the federalizing of all state defamation torts, this Court disapproved of the idea of making "the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 700.

As the court of appeals correctly observed, the reasoning of *Paul* is especially applicable here, as the claimed injuries in both cases are analogous (Appendix to Petition (hereinafter Appendix), pp. 5a-7a). While *Paul* involved harm to reputation which interfered with employment opportunities (424 U.S. at 697), Petitioner complains essentially of the same damage to reputation along with anxiety and mental anguish. Anxiety and mental anguish, however, are part and parcel of damage to reputation. Accordingly, Petitioner cannot realistically argue that his injuries constitute a much more serious infringement on liberty than those suffered by the plaintiff in *Paul*.

Moreover, as with the tort of defamation at issue in *Paul*, the common law tort of malicious prosecution has likewise achieved a uniform level of acceptance throughout the states. *See Restatement 2d Torts*, § 653. Because virtually every criminal defendant is either on bail or incarcerated pending trial, acceptance of Petitioner's argument here would result in the federalizing of every common law claim of malicious prosecution. Such a result would run contrary to *Paul's* admonition against a federal system of tort law. *See also Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

While Petitioner's concern and anguish over the possible disposition of his criminal charges is certainly understandable, the Constitution provides adequate procedural safeguards for criminal defendants which helps reduce such

anxiety. Indeed, the right to counsel and to a fair jury trial generally enable the innocent to count on the system to exonerate them, which is exactly what occurred in this instance. Beyond existing constitutional safeguards, however, the Constitution should not be interpreted as supporting an independent liberty interest/due process claim in favor of an undetained criminal defendant who has been exonerated by the system. While the states have, for good reason, chosen to fashion a common law remedy in cases where a prosecution is initiated maliciously without probable cause, such a cause of action is not constitutionally compelled.

## II.

## ASSUMING PETITIONER HAS ADEQUATELY PLED A CONSTITUTIONAL CLAIM, SUCH CLAIM IS TIME-BARRED UNDER THE STATUTE OF LIMITATIONS

The statute of limitations for civil rights claims asserted in Illinois federal courts is two years. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986). Petitioner's federal lawsuit was filed on June 26, 1990. Because the criminal charges were not dismissed until June 27, 1988, the district court concluded that the statute of limitations would not bar Petitioner's § 1983 civil rights claim for malicious prosecution because such claims "accru[e] when the prosecution terminates in favor of the defendant" (Appendix, p. 17(a)).

Respondents contend that any constitutional claims pled by Petitioner accrued when the charges were placed against him in July, 1987, rather than when they were dismissed in late June, 1988. The accrual date for federal causes of action is determined by reference to federal law. *See 2 Moore's Federal Practice*, § 2.08(2) n. 25. A federal civil rights claim accrues when the plaintiff first has reason



to know of the injury which was caused by a constitutional deprivation. *See, e.g., Singleton v. City of New York*, 632 F.2d 185, 191 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). In this case, the deprivation of Petitioner's liberty allegedly occurred when he was first subjected to the conditions of his bond in July, 1987. Accordingly, Petitioner's due process claim for deprivation of liberty should have accrued on July 17, 1987.

The district court's reliance on the date the charges were dismissed was premised on the fact that common law claims for malicious prosecution accrue when the prosecution terminates. This conclusion seems plausible, at first blush, based upon precedent suggesting that common law malicious prosecution becomes a federal cause of action when it is combined with the deprivation of a constitutional right. *See e.g., Rose v. Bartle*, 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990).

Respondents dispute the validity of this approach. While the circumstances surrounding the initiation of criminal charges may support a civil rights claim for deprivation of liberty, this should not lead to the federalizing of a common law tort. As Professor Sheldon Nahmod has suggested, "tort-laden terminology . . . only serves to obscure meaningful constitutional analysis." S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of § 1983*, § 3.15, p. 214 (3rd Ed. 1991). Therefore, "it is inappropriate to speak of § 1983 malicious prosecution." *Id.*

The rationale underlying Professor Nahmod's suggestion is compelling. The mere fact that a pleader can establish a federal civil rights claim arising from a state court pros-

ecution should not lead to the federalizing of a common law tort which includes other elements which are irrelevant to the deprivation of a constitutional right. For instance, the absence of probable cause is an indispensable element of a common law malicious prosecution claim, but not necessarily to the constitutionality of the decision to prosecute. *See Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). Accordingly, a civil rights plaintiff bringing a constitutional challenge to the decision to prosecute should not be required to establish the absence of probable cause unless he has been subjected to a significant restraint on liberty within the meaning of *Gerstein*. For example, neither an equal protection nor a first amendment challenge to the decision to prosecute depends on the presence or absence of probable cause.

Similarly, the common law's requirement of favorable termination of criminal charges as an element of a malicious prosecution claim is not essential to the success of a federal constitutional challenge to a particular prosecution. Indeed, even a convicted defendant may pursue a civil rights claim against those who caused his prosecution. *See King v. Goldsmith*, 897 F.2d 885 (1990); *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). If favorable termination is not an essential element of a civil rights challenge to an unfounded prosecution, then it makes little sense to set the accrual date for such claims on the day the prosecution is terminated.

Common law malicious prosecution claims and civil rights challenges to certain aspects of criminal prosecutions are mutually exclusive concepts which need not be interwoven or superimposed upon each other for any purpose, including the statute of limitations. If Petitioner was deprived of a liberty interest by virtue of his prosecution, that deprivation occurred when the charges were



placed against him in July, 1987, rather than when they were dismissed approximately one year later.

Because the statute of limitations provides an alternative basis on which to affirm the Seventh Circuit, Petitioner's Petition should be denied.

## III.

## DEFENDANT OLIVER'S ENTITLEMENT TO QUALIFIED IMMUNITY PROVIDES AN ALTERNATIVE REASON FOR DENYING THE WRIT

Pursuant to principles of qualified immunity, public officials may not be subjected to suit under the Civil Rights Act unless their conduct violated clearly established constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This Court recently refined this test for qualified immunity, emphasizing the need for a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987).

Even if Petitioner has sufficiently pled a liberty interest/due process claim in connection with his prosecution, the uncertainty of the constitutional framework for such claims, as evidenced by the preceding discussion, prevents any such right from being deemed clearly established. Indeed, in dissenting from the denial of a writ of *certiorari* in a recent case, Justice White noted that "there has been considerable confusion in the circuit courts concerning the availability and contours of a § 1983 malicious prosecution claim." *Campbell (sic) v. Brummett*, 112 S.Ct. 2323, *citing*, *Brummett v. Camble*, 946 F.2d 1178, 1180 n. 2 (5th Cir. 1991). Moreover, the Seventh Circuit has stated that "whether or not the right to be free from prosecution without probable cause exists, it does not appear to be

clearly established." *Kompare v. Stein*, 801 F.2d 883, 891 n. 9 (7th Cir. 1986). That same court later stated that it is an open and difficult question whether a criminal defendant who is free on bond during the pendency of criminal charges may pursue a constitutionally based malicious prosecution claim on the basis of a deprivation of liberty. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988). Accordingly, the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause.

Because the doctrine of qualified immunity provides an alternative basis for affirming the lower court regardless of whether Petitioner's complaint stated a cognizable cause of action under § 1983, Petitioner's petition for a writ of *certiorari* should be denied.

## IV.

## PETITIONER'S FAILURE TO SUFFICIENTLY ALLEGE THAT HE WAS PROSECUTED PURSUANT TO A MUNICIPAL CUSTOM, PRACTICE OR POLICY PROVIDES AN ALTERNATIVE BASIS FOR DENYING THE WRIT AS TO PETITIONER'S CLAIMS AGAINST THE CITY OF MACOMB

In order to state a civil rights claim against either a municipality or a public official in his official capacity, a plaintiff must show that his injury was caused by a municipal custom, practice or policy. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658 (1978); *Kentucky v. Graham*, 473 U.S. 159 (1985) (official capacity claim). Because police misconduct claims involve actions undertaken by lower level, non-policymaking public employees, allegations based upon a single incident of such misconduct are generally insufficient to give rise to a



municipal custom or policy. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (single incident may suffice where conduct undertaken by policymaker).

In this case, Petitioner's policy allegations against the City stem from the Mayor's delegation of his responsibility for enforcing the narcotics laws to Detective Oliver. Petitioner also targets the City's decision to provide Oliver with the funds to use for the purchase of controlled substances (Appendix, pp. 37a-38a, paras. 8-9).

It stretches the imagination to claim that the provision of funding was an improper policy which caused Petitioner's injuries. Petitioner's injuries were allegedly caused by Officer Oliver's failure to discover Veda Moore's unreliability as an informant, a premise which bears no relation to the City's decision to fund the undercover drug operation. The mere fact that a municipality funds a police operation does not render it liable for every flaw in the operation itself, especially where, as here, the City had no input into the development or implementation of the investigation. If Petitioner's funding theory were accepted, every police shooting would support a *Monell* claim through an allegation that the City provided funding for purchase of the weapon.

Petitioner's targeting of the Mayor's delegation of the narcotics investigation to Officer Oliver is similarly flawed. Municipalities always delegate control over police operations to the police department. Petitioner has not alleged that the City authorized Officer Oliver to employ unreliable, paid informants, but rather, Petitioner has claimed only that the City delegated to Oliver the leeway to conduct a police operation in the manner Oliver felt proper. *See* M. Schwartz & J. Kirklin, § *1983 Litigation: Claims,*

*Defenses and Fees*, § 3.10, p. 169 (2nd Ed. 1991) ("highly unlikely" that malicious prosecution could support claim for municipal liability).

In essence, Petitioner brought suit based upon a single act of police misconduct and tacked on conclusory allegations of a custom, practice or policy in order to hold the City of Macomb responsible. Accordingly, as the district court concluded, even if Petitioner has sufficiently stated a § 1983 cause of action against Officer Oliver, he has failed to allege sufficient facts to support his claim against the City (Appendix, p. 25a). In conjunction with Oliver's entitlement to qualified immunity, therefore, Petitioner's failure to sufficiently allege a claim against the City provides an alternative reason for denying the writ.

## CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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